

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

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Issue date: 07Feb2002

Case No.: 2001-INA-31

In the Matter of:

RED HOT & BLUE,
Employer,

on behalf of

MIRIAM ZEPEDA CONTRERAS,
Alien

Appearances: Samuel N. Smith, Esq.,
On Behalf of the Employer

Before: Chapman, Wood, and Vittone
Administrative Law Judges

DECISION AND ORDER AFFIRMING
DENIAL OF CERTIFICATION

This case arose from an application for labor certification on behalf of Alien Miriam Zepeda Contreras ("Alien") filed by Red Hot & Blue ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26.

The following decision is based on the record upon which the Certifying Officer denied certification and Employer's request for review, as contained in the Appeal File ("AF") and any written argument of the parties.

STATEMENT OF THE CASE

On June 2, 1995, Employer filed an application for alien employment certification on behalf of the Alien to fill the position of Cook. The job to be performed was described as follows:

Prepare, season and cook a variety of dishes, dinners, desserts and other foods according to recipes. Prepare meats, soups, sauces, vegetables, and other foods prior to cooking. Portion and garnish food and use all kitchen utensils and equipment.

Total hours of employment were listed as 40 hours a week, from 8:00 a.m. to 5:00 p.m., with overtime as needed. Minimum requirements for the position were listed as two years of experience in the job offered, or as a cook helper. AF 26).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on June 13, 2000. The CO concluded, after reviewing the menu provided by the Employer, that the appropriate Dictionary of Occupational Titles (DOT) code was Cook, Barbecue (DOT 313.381-022, SVP 5) and not Cook, Specialty, Foreign Food (DOT 313.361-014, SVP 7). The CO noted that the establishment was primarily a barbecue platter/sandwich shop which served a variety of barbecue food selections, that do not require extensive training in order to prepare and cook. The CO stated that the preparation of these food items did not correspond with the job duties of a Cook, as the cook in Employer's restaurant did not prepare soups, salads, gravies, desserts, sauces, and casseroles, or bake, roast, broil, or steam meats, fish, and vegetables.

The CO found that the requirement of two years of experience exceeded the requirements in the DOT, which are six months to one year of combined education, training, and experience. Citing 20 C.F.R. § 656.21(b)(2), the CO instructed the Employer to submit evidence that the requirements arise from a business necessity; the Employer was advised that rebuttal evidence needed to include documentation clearly establishing the need for two years experience in order to prepare the items on the Employer's menu. In the alternative, the Employer could reduce the requirements, and amend its Application.

In Rebuttal, the Employer provided a letter as well as a menu (the menu previously submitted had been a carry-out menu), and a dessert menu. The Employer argued that the job was improperly classified as Cook, Barbecue, and should be classified under Cook, Specialty, Foreign Food. The Employer noted it had a full-service restaurant, with about 100 seats, and employed several cooks a shift, as well as a prep cook and two kitchen helpers a shift. The Employer pointed out that a review of the menu showed that the cook prepares soups, salads, sauces, desserts, and bakes and grills, noting the presence of these items on the menu. The Employer claimed that the cook is responsible for preparation of all items on the menu, and that this required more than just preparing, seasoning and barbecuing pork, beef, and chicken. The Employer stated that its cook prepared soups, salads, desserts, and baked and grilled. The Employer acknowledged that the menu includes easy to prepare items, but claimed that it required the skill of a Cook, Specialty, Foreign Food to prepare these items.

In his Final Determination (FD), issued on September 14, 2000, the CO noted that the Employer had stated in rebuttal that the cook prepares soups, salads, sauces, desserts, and bakes and

grills; and is responsible for preparation of all the items on the menu. The CO noted that the Employer had not provided any evidence or documentation, as required in the NOF, to support its claim that two years of experience was necessary to prepare the foods on the menu. The CO concluded that none of the information demonstrated that one would need extensive training to prepare the foods listed on the menu.

The CO also concluded that the menu showed that the Employer's business was limited to a specific specialty food, barbecue and closely related items, for which the DOT has provided a separate and distinct category of Cook, Barbecue, which the CO found outlined all the stated job duties and responsibilities on the ETA 750. The CO denied certification. (AF 5-7).

DISCUSSION

In the instant case, we agree with Employer that it is offering a position that is more than a "cook, barbecue" as defined by the DOT. We agree, however, with the CO, that the position does not appear to be properly categorized as requiring the kind of skill and experience needed to perform the position described by the DOT definition for "Cook, Specialty, Foreign Food." For instance, there is no indication that the position offered involves any menu planning, or responsibilities for estimating food consumption and requisitions or purchasing supplies. Although it is not necessary that a particular position exactly match the DOT definition in respect to all duties, the "Cook, Specialty, Foreign Food" definition strongly suggests that the relatively long experience requirement is related to special skills in the kitchen both in regard to food preparation and to kitchen administration.

It appears that the job position offered by the Employer fits more closely in the category of Cook, Specialty, hotel and restaurant, DOT 313.361.026. The duties of this position are:

Prepares specialty foods, such as fish and chips, tacos, and pasties (Cornish meat pies) according to recipe and specific methods applicable to type of cookery. May serve orders to customers at window or counter. May prepare and serve beverages, such as coffee, clam nectar, and fountain drinks. May be required to exercise showmanship in preparation of food, such as flipping pancakes in air to turn or tossing pizza dough in air to lighten texture. May be designated according to food item prepared as Cook, Fish And Chips (hotel & rest.)

Alternatively, the job position offered by the Employer fits into the category of Cook, Fast Food (hotel & rest.), DOT 313.374-010, which lists the following duties:

Prepares and cooks to order foods requiring short preparation time: Reads food order slip or receives verbal instructions as to food required by patron, and prepares and cooks food according to instructions. Prepares sandwiches [SANDWICH MAKER (hotel & rest.) 317.664-010]. Prepares salads and slices meats and cheese, using slicing machine, [PANTRY GOODS MAKER (hotel & rest.) 317.684-014]. Cleans work area and food preparation equipment. May prepare

beverages [COFFEE MAKER (hotel & rest.) 317.684-010]. May serve meals to patrons over counter.

Both of these occupations have an SVP of 5, or a requirement of six months to one year of experience. While the duties in these occupations do not exactly match the duties of the job position offered by the Employer, they are more closely analogous to Employer's position in that the job duties suggest that persons in these occupations prepare standard fare according to pre-set recipes or formulas, and do not exercise discretion in planning or preparing menu items, or perform the other managerial duties listed for Cook, Specialty, Foreign Food.

Accordingly, we will consider whether the two years of experience in the job offered has been justified by business necessity. The Board in *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(en banc), set out the standard by which an employer can show "business necessity." An Employer must show:

- 1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and
- (2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer.

Employer's business necessity argument is that it is not merely a barbecue restaurant; it is a full service restaurant, with 100 seats, and a menu that includes more than barbecue items. We find that an experience requirement bears a relationship to the position of cook in the context of the Employer's restaurant. We do not find, however, that there is sufficient documentation in this record to establish that two years of experience are essential to a cook's performing, in a reasonable manner, the job duties described. We do not find Employer's statements, unsupported by any documentation, persuasive to establish that two years of experience are required for an employee to be able to prepare and cook the items described on the Employer's menus.

Although Employer's establishment is a sit-down restaurant, its menu indicates that it offers moderately priced meals, that are primarily of a short-order nature. Employer argues that the employee in this position will be required to perform all the of the job duties listed in the job description for Cook, Specialty, Foreign Food, including preparing soups, salads, and desserts, and baking and grilling.

The menus provided by the Employer indicate that a limited number of simple items are prepared and presented to the public at moderate prices. These items normally are prepared by a cook with less experience and less training than those prepared by a chef or cook a more expensive restaurant, where a greater number of more complex menu items is offered. Further, the items listed on the menu, although they involve some degree of skill to prepare, remain the same and are prepared over and over again in the same basic manner. The record contains no underlying evidence to support

the Employer's claim that this job opportunity requires the more complex cooking skills detailed in the job description for Cook, Specialty, Foreign Food.

It follows that the Employer's requirement of two years' experience is unduly restrictive, since the DOT job descriptions for the position of Cook, Specialty, and Cook, Fast Food, require only six months to one year of experience. The CO properly denied certification on the grounds that the two year experience requirement was unduly restrictive, and did not arise from business necessity.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

SO ORDERED.

For the panel:

A
LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five

double-spaced pages. Upon the granting of a petition the Board may order briefs.